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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1942

No. 661

OBMAN W. EWING,

Petitioner.

THE UNITED STATES OF AMERICA

PETITION FOR REHEARING OF APPLICATION FOR WRIT OF CHETTORAGI

> James J. Lavouren, Counsel for Petitioner,

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PETITION FOR REHEARING OF APPLICATION FOR WRIT OF CERTIORARI.

To the Honorable Harlan F. Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Comes now, Orman W. Ewing, and respectfully petitions this Honorable Court for a re-consideration of his petition for a writ of certiorari to review the judgment of the District Court of the United States for the District of Columbia as affirmed by the United States Court of Appeals for the District of Columbia.

Petition for certiorari was denied on March 15th, 1943. The petitioner is confined at the District Jail, Washington, D. C. Petitioner is not unmindful that careful consideration was given to his petition for certiorari. However, he is so convinced that there was a denial of due process in this case that he asks the Court to consider anew and re-inquire into the question of evidence involved.

Summary Statement of Matter Involved.

Petitioner was indicted on November 4, 1941, for the crime of rape. The offense was alleged to have been committed on October 26, 1941, and the petitioner was arrested on the night of October 27th. At the time he was charged with this offense petitioner was 57 years of age. He was denied bond and has been confined in jail since his arrest. After a trial before the Honorable James W. Morris and a jury in the United States District Court for the District of Columbia, petitioner was convicted. The judgment and sentence of the Court was confinement in the penitentiary for a period of 8 to 24 years (R. 22). The court below affirmed the judgment and sentence (R. 124). Petitioner has at all times denied the charge and has consistently maintained his innocence.

During the course of the trial, a defense witness was asked questions on cross-examination about a visit made by this witness to the home of the mother of the complaining witness in Utah. The interrogation developed that the witness was a friend of the mother of the complaining witness and the government sought to establish that the purpose of the visit was to discuss the subject matter of the pending trial. On direct examination, there was no evidence developed with respect to this visit. However, on cross examination, the government asked:

"No, she didn't" (R. 32).

[&]quot;Q. Now, in this conversation did Mrs. Crandall ask you if you thought Ewing was guilty and didn't you say, yes?

Notwithstanding the aforesaid denial, the government called as the last witness in the case, in rebuttal, the mother of the complaining witness and, after redeveloping the visit to Utah, the following colloquy occurred:

"Q. On that occasion, did you look at Miss Chamberlin and point and say this: 'Do you believe that Mr. Ewing is guilty of raping my daughter,' and did she say, 'I do believe it?"

"A. Yes, she did.

"Q. Did she further say on that occasion, 'He is facing the electric chair, and I have got to be on his side?"

"A. Yes (R. 32, 33)."

It is with respect to this line of testimony, and the propriety thereof, that the basic question of law underlying this petition is raised. Error was assigned and the court below considered the question. The majority concluded that the admissibility in evidence of the opinion of the witness as to the guilt or innocence of the accused was proper. The Chief Justice disagreed.

Petitioner protests with all possible vigor such a departure from the accepted and orderly course of judicial proceeding. There is ample justification for this Court reviewing petitioner's conviction due to the supervisory power exercised over Federal Courts. This principle was very clearly set forth in the case of *McNabb* v. *United States*, decided March 1, 1943 (No. 25). In fact in the *McNabb* case this Court stated:

"And in formulating such rules of evidence for Federal criminal trials the Court has been guided by considerations of justice not limited to the stock canons of evidentiary relevance."

However, this case goes further. The Court of Appeals affirmed this conviction under a mis-statement of facts. It was the belief of the Court of Appeals that the objectionable

matter complained of had been deemed proper and entirely admissible. However, we say that a fraud has been committed upon the Court and this Court.

In the majority opinion in the Court of Appeals we find

this:

"Finally from what has been said it appears there was no basis for the charge of incompetency made against the trial attorneys in connection with this assignment of alleged error. The record shows they regarded this inquiry as proper, and therefore made no objection. They investigated the law, and the result has justified their judgment."

In the separate concurring opinion, the Chief Justice of the Court of Appeals said this:

"Appellant was represented by prominent counsel of his own selection. For reasons satisfactory to themselves they allowed this evidence to be given without protest."

There appears in the government's opposition to the petition for certiorari, at page 8, the following:

"It was anticipated previous to the trial that Afton Crandall would appear and that if she did appear she would possibly be called as a witness to relate a conversation with Hester Chamberlin for the purpose of showing interest, bias, or personal feeling on the part of Hester Chamberlin as a defense witness. The question was fully discussed among all counsel and with Lowell H. Ewing and the judgment was that such testimony was not inadmissible for that purpose."

This is taken from affidavit filed by one Roy S. Parsons, one of the attorneys present during the criminal trial of petitioner.

As a matter of fact, there was no such conference.

The petitioner was represented by only one attorney experienced in criminal procedure, Charles Henry Smith,

Esq. of Alexandria, Virginia. Neither Mr. McCormick, or Mr. Parsons, had any experience with criminal procedure. Therefore, it becomes significant to find that Charles Henry Smith makes oath to the fact that there was no such conference. His affidavit is as follows:

"STATE OF VIRGINIA,

City of Alexandria, To-wit:

"I, Charles Henry Smith, being first duly sworn, makes oath as follows:

"I was one of counsel for the defendant in the trial of the case of United States v. Orman W. Ewing in the United States District Court for the District of Columbia, at which trial Mr. Ewing was found guilty by the jury; I have had no connection with the case whatsoever after the verdict.

"Recently it has been called to my attention that a statement or affidavit filed in the case in some connection which I do not fully understand, by Mr. Roy S. Parsons, stated as follows:

'It was anticipated previous to the trial that Afton Crandall would appear, and that if she did appear she would possibly be called as a witness to relate a conversation with Hester Chamberlin for the purpose of showing interest, bias or personal feeling on the part of Hester Chamberlin as a defense witness. The question was fully discussed among all counsel and with Lowell H. Ewing and the judgment was that such testimony was not inadmissible for that purpose.'

"I also understand that it has been said by either Mr. Parsons or some one else that when the mother of the prosecutrix took the stand and made a certain statement in answer to a leading question by government counsel that Hester Chamberlin admitted to her that she thought the defendant, Ewing, was guilty, had been discussed by counsel and that we agreed that it was admissible testimony.

"No such decision was ever reached by me nor was any conference ever held with me whereby it was determined that such testimony was admissible. To begin with, I did not know that the witness, Afton Crandall, was going to testify. I had heard only incidentally that she was present in the court room during the trial. Considering the fact that all witnesses had been excluded under the rule of the Court, I naturally assumed that this witness would not testify. When she was called to the witness stand it was late one afternoon after a very strenuous day when I was quite ill, and was in attendance on the Court against my physician's advice. The question was asked and the answer given so suddenly that I must frankly state that I did not fully appreciate what had happened. I have never agreed that such testimony was admissible for any purpose and I believe now, as I believed then, that it was prejudicial to the highest degree, and that it had tremendous effect on the jury. It is true that I did not move for a mis-trial at the time nor did I register any objection. The only explanation I have for not doing so is the fact that I was not well. I was highly nervous due to an elevated blood pressure and extreme hypertension. I recall vaguely some question arising as to whether we should put Martha Taylor, the sister of Hester Chamberlin, on the stand to rebut this damaging statement made by the witness, Afton Crandall, and I did say at that time that I thought there was a strong possibility if we undertook to rebut the statement, we would waive any right we had as to the prejudicial nature and character of the testimony. I thought then and think now that this testimony was inadmissible and damning in its effect on the defendant's case.

(S.) Charles Henry Smith."

"Subscribed and sworn to before me, the undersigned notary public, in and for the State and City aforesaid, this 2nd day of April, 1943.

"ALICE R. BAKER, Notary Public.

[SEAL.]

My Commission expires October 14th, 1946."

Therefore, if the Trial Court was satisfied there was no such conference, it is believed that a motion for a new trial would have been granted. We are also of the belief that if the Court of Appeals had been satisfied there was no such conference petitioner's conviction would have been reversed. We are justified, therefore, in saying that a fraud has been practiced on this Court and the Court of Appeals as well as the District Court.

We are not unmindful of the obstacles confronting us in trying to correct and rectify this situation. It goes without saying that this Court, maintaining, as it does, its supervision over lower Federal courts, has the right and the power to extricate the petitioner from this legal entanglement, not of his making, and, as this Court has said, as it did in the *McNabb* case, that in formulating such rules of evidence for Federal criminal trials, the Court "has been guided by considerations of justice not limited to the stock canons of evidentiary relevance."

It would seem that the language of Hon. Josiah A. Van Orsdel in the case of *Darby* v. *Montgomery County National Bank*, 63 App. D. C. 31 (73 F. 2d, 181) has application here:

"Can it be that justice is so blind that an insignificant technical error estops a court of justice from extending the relief here so convincingly demanded." And again, in the same case, Honorable William Hitz dissenting, had this to say:

"This is putting too high a value on taking two bites of a cherry, and the denial of a review here of a judgment acknowledged to be wrong because the trial Judge and counsel in a common effort to dispatch business, permitted a futile formula of words, is to sacrifice the substance of justice to the shadow."

It is clear that a great injustice has been done in this case. We now appeal to this Court to correct this injustice.

If the Court has been imposed upon, and a fraud practiced upon the Court, clearly any investigation will show that the situation is as we have recited in this brief.

No judgment of conviction wherein the accused is deprived of his liberty should ever be sustained when it rests upon such an unstable foundation as does the conviction in this case.

In view of the circumstances we petition this Court to grant a re-hearing.

Respectfully submitted,

James J. Laughlin,
National Press Building,
Washington, D. C.
Counsel for Petitioner.

This petition for rehearing is filed in good and not for purposes of delay.

James J. Laughlin, Counsel for Petitioner.

